

COVID-19 Pandemic – Comprehensive German Legislative Support Measures

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The economic shock and disruption caused by the outbreak of the SARS-CoV-2-Virus (COVID-19-pandemic) resulted in unprecedented circumstances for companies and prompted recent emergency rescue measures by the German legislator. In the following, we are highlighting two major legislative measures that will come into force in the next few days.

Legislative changes to mitigate the consequences of the COVID-19-pandemic with respect to specific contract, corporate, insolvency and criminal law matters (the “COVInsAG”)

On 25 March 2020, the German parliament passed a bill that aims to mitigate the consequences of the COVID-19-pandemic with respect to various specific contract, corporate, insolvency and criminal law matters. The legislative changes are foremost intended to facilitate the continuation of businesses that have or will become insolvent as a result of the COVID-19-pandemic or are experiencing economic difficulties. The legislative changes are expected to come into force on Saturday, 28 March 2020. Changes introduced by the COVInsAG include:

1. Suspension of obligation to file for insolvency

German insolvency law contains rigid obligations for directors to file a company for insolvency without undue delay, but no later than three weeks after the company has become insolvent (i.e. illiquid or balance-sheet insolvent). These obligations to file for insolvency will be suspended until 30 September 2020. This relief, however, does not apply if the insolvency is not a consequence of the COVID-19-pandemic or if there are no prospects of eliminating an existing illiquidity. It will be assumed that an insolvency was caused by the effects of the COVID-19-pandemic and that there are prospects of overcoming an existing illiquidity, if the debtor was not illiquid on 31 December 2019.

2. Relief from liability for managing directors

Under German corporate law, managing directors can become personally liable for payments made after the company has become insolvent. The COVInsAG complements the suspension of insolvency filing obligations by relieving managing directors from liability for payments made in the ordinary course of business, in particular, where such payments are made to maintain or resume business operations or to implement a restructuring concept.

3. Suspension of termination rights for non-payment of rent

A landlord will not be able to terminate a lease of land or premises if the tenant fails to pay rent in the period from 1 April 2020 to 30 June 2020. Non-payment of the rent must, however, be linked to the effects of the COVID-19-pandemic. The link between the pandemic and non-performance has to be adequately demonstrated by the tenant. The suspension of these termination rights only applies until 30 June 2022.

4. Restructuring loans

The COVInsAG contains certain privileges for loans that are made during the suspension period (even if the respective company is not insolvent). Repayments made prior to 30 September 2023 and security granted for such loans will not be subject to insolvency claw back. The same applies with respect to repayments of shareholder loans and loans that economically have the same effect as shareholder loans (however, not with respect to security granted for such loans).

Under German law, a lender may become liable in damages (and even face criminal liability) if a restructuring loan is insufficient to achieve a turnaround, and instead merely delays the filing for insolvency for that lender's own benefit. The COVInsAG mitigates this risk by stating that any such new loans and any security granted for them will not be regarded as aiding or facilitating a delay in filing for insolvency.

5. Protection from insolvency claw back

Further to the privileges for restructuring loans, the COVInsAG provides for additional protection from insolvency claw back. Actions taken during the suspension period which assist or enable another party to take security or obtain satisfaction of an obligation are not subject to insolvency claw back in subsequent insolvency proceedings.

This applies only to security and satisfaction which the other party was able to claim in this manner and at that time. It does not apply if the other party was aware that the debtor's restructuring and financing efforts were not feasible to cure an existing illiquidity.

These regulations shall apply *mutatis mutandis*:

- to payments made or services rendered instead of specific performance;
- to payments made by a third party upon instruction of the debtor;
- to the provision of security other than the security originally owed, if this other security is not worth more than the security owed;
- to the shortening of payment due dates; and
- to the granting of payment reliefs.

6. Measures to simplify the making of corporate resolutions

The COVInsAG provides for certain simplifications for corporates to hold (shareholder) meetings and pass corporate resolutions (which under normal circumstances would require in personam meetings). The law, for example, introduces the option for stock corporations to hold entirely virtual annual or extraordinary general meetings, while convocation periods have been reduced to 20 days (i.e. it is sufficient to publish the convocation notice on the 21st day prior to the meeting). Further, the management board of a stock corporation can resolve to make an advance dividend payment even if the articles do not provide for this. With respect to limited liability companies the law provides that shareholder resolutions can be passed by simple text form (which would include e.g. email) or in writing even if not all shareholders have given their consent.

7. Measures with respect to consumers and small businesses

The COVInsAG also provides for some protective measures with respect to consumers and small businesses. These provide consumers and small businesses with the right to refuse performance or the making of payments under certain contracts if their inability to perform the relevant contractual duties was caused by the COVID-19-pandemic (moratorium on contractual obligations):

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- This applies to essential consumer contracts concluded before 1 April 2020 which contain continuing obligations of the parties and in cases where the consumer cannot perform its obligations falling due between 1 April 2020 and 30 June 2020 without incurring significant hardship.
 - This also applies to small businesses if a small business cannot perform its obligations from an essential contract, which was concluded before 8 March 2020, without jeopardizing the ongoing viability of its business operations.

The right to refuse performance is not permitted where it would result in an unreasonable burden on the other party. In such a case the debtor is entitled to terminate the relevant contract instead. The refusal right also does not apply to lease, credit, or employment agreements.

Regarding consumer credit agreements concluded before 15 March 2020 payment obligations regarding principle and interest falling due between 1 April 2020 and 30 June 2020 are being deferred for three months. However, the consumer can opt to continue his payment obligations, making the deferment inapplicable. Terminations of consumer credit agreements by the lender due to payment defaults or due to a deterioration of the financial condition or in the value of security of the borrower are not permitted. The deferment is not exercisable if it results in an unreasonable burden on the lender.

Establishment of the Economic Stabilization Fund (the “WSF Act”)

The German Federal Government will set up the Economic Stabilization Fund (“WSF”) to reduce the damage caused to the German real economy by the COVID-19-pandemic. The WSF shall stabilize companies whose existence is of significant importance for the economy in Germany or for the labor market.

1. Guarantees

The WSF can provide guarantees of up to **EUR 400 billion** for debt instruments issued from the date the WSF Act comes into force until 31 December 2021 and for other liabilities of German companies in the real economy in order to eliminate liquidity constraints and to support refinancing on the capital market.

The term of the guarantees may not exceed 60 months and companies must pay a guarantee fee in line with market conditions.

It is expected that the further terms and conditions of the guarantees will soon be determined by a regulation, which will set out

- the details for determining the type of guarantee and the risks to be assumed,
- the calculation and the crediting of guarantee amounts,
- the calculation of the guarantee fee and other conditions,
- the determination of guarantee caps for individual companies and certain types of guarantees, and
- other conditions which are required to stabilize the eligible companies during the term of the guarantees.

Where debt instruments and other liabilities are guaranteed by the WSF, certain restrictions on such instruments must be taken into account by the creditor (e.g. no early termination, no enforcement action or set-off, no participation in potential insolvency proceedings).

2. Recapitalizations

The WSF can participate in the recapitalization of companies up to a total amount of EUR 100 billion if and to the extent necessary for the stabilization of the company. The recapitalization measures include the acquisition of subordinated debt, hybrid bonds, profit participation rights, silent partnerships, convertible bonds, the acquisition of shares in companies and the assumption of other equity instruments of these companies (in particular increase of the registered share capital and issuance of new shares).

A recapitalization must be carried out under market conditions.

The WSF will only make a participation if the Federal Government has an important interest in the stabilization of the enterprise and if stabilization cannot be achieved by other more economically efficient means.

The Federal Ministry of Finance and the Federal Ministry of Economics and Energy may agree to issue more detailed provisions on

- the consideration and other conditions of the recapitalization,
- equity participation caps for individual entities and for certain types of equity instruments,
- the conditions under which the WSF may resell its equity participations, and
- other conditions necessary to ensure the stabilization of the companies in the context of the recapitalization.

In some corporate law respects, the new legislation facilitates the implementation of recapitalization measures. E.g., the agreement on a silent partnership or the issuance of profit participation rights and hybrid instruments (without the right to convert into shares) are admissible without the approval of the general meeting, and the majority requirements for resolving on equity instruments (in particular with exclusion of subscription rights) are lowered.

3. Eligible companies

A company has to meet at least two of the following three criteria in the last two financial years prior to 1 January 2020 to become eligible for the guarantee or recapitalization measures described above:

- a balance sheet total of more than EUR 43 million;
- more than EUR 50 million in revenues; and
- more than 249 employees on an annual average.

However, the Interministerial Economic Stabilization Fund Committee may, at its sole discretion, also decide on applications from companies, which do not meet the eligibility criteria if the company is active in a sector critical to infrastructure (information technology, telecommunications, cloud computing service providers, telematics, media with broad distribution, sector-specific software) or is of comparable importance for the security or economy.

Further requirements for stabilization measures are that the company may have no other financing alternatives, must have a viable business model after overcoming the COVID-19-pandemic and may not satisfy the EU definition of a company in financial distress as of 31 December 2019.

4. Refinancing of Kreditanstalt für Wiederaufbau

In response to the COVID-19-pandemic, the WSF can grant loans to KfW of up to **EUR 100 billion** to refinance KfW when providing liquidity support to borrowers and/or intermediaries under the new KfW special program provided by the Federal Government. The WSF determines the detailed terms and conditions for granting loans on a case-by-case basis.

5. Other measures

The funds provided by the WSF are separate from and will be provided in addition to the funds that will be available to companies and small businesses in financial difficulties via the various KfW programs (in particular funds and/or guarantees provided by KfW indirectly via intermediaries).

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